

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TEXARKANA DIVISION

CORNELL McHENRY #1928881	§	
v.	§	CIVIL ACTION NO. 5:14cv157
MIKE SHEPHARD, ET AL.	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE  
AND ENTERING FINAL JUDGMENT

The Plaintiff Cornell McHenry, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

After review of the pleadings, the Magistrate Judge issued a Report recommending that the lawsuit be dismissed without prejudice. The Magistrate Judge observed that McHenry challenged the legality of his conviction, a claim which cannot be brought as a civil rights lawsuit but must be pursued through habeas corpus. The Fifth Circuit has stated that a civil rights action which seeks to obtain immediate release from confinement should be dismissed without prejudice for failure to state a viable civil rights claim. Johnson v. Chenier, 438 F.App'x 251, 2011 WL 2565277 (5th Cir., June 29, 2011); Mendenhall v. Valdez, 376 F.App'x 372, 2010 WL 1644050 (5th Cir., April 21, 2010), *citing* Preiser v. Rodriguez, 411 U.S. 475, 499 (1973).

The Magistrate Judge further stated that the lawsuit could not be construed as a habeas corpus petition because McHenry's conviction is still on appeal in the state courts and he must exhaust his state remedies before seeking federal habeas corpus relief.

McHenry received a copy of the Magistrate Judge's Report but filed no objections thereto; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this cause and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Report of the Magistrate Judge is correct. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918, 109 S.Ct. 3243 (1989) (where no objections to a Magistrate Judge's Report are filed, the standard of review is "clearly erroneous, abuse of discretion and contrary to law."). It is accordingly

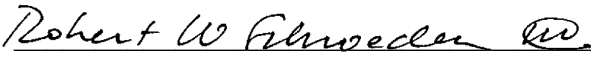
**ORDERED** that the Report of the Magistrate Judge (docket no. 8) is hereby **ADOPTED** as the opinion of the District Court. It is further

**ORDERED** that the above-styled civil action be and hereby is **DISMISSED WITHOUT PREJUDICE** for failure to state a claim upon which relief may be granted. 28 U.S.C. §1915A. Because this lawsuit is dismissed for failure to state a claim, it counts as a strike for purposes of 28 U.S.C. §1915(g). The Plaintiff Cornell McHenry is warned that if he files three lawsuits or appeals which are dismissed as frivolous or for failure to state a claim upon which relief may be granted, he will not be able to proceed *in forma pauperis* in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See Adepegba v. Hammons*, 103 F.3d 383, 385-87 (5th Cir. 1996). It is further

**ORDERED** that the Clerk shall send a copy of this order to the Administrator of the Three Strikes List for the Eastern District of Texas. Finally, it is

**ORDERED** that any and all motions which may be pending in this action are hereby  
**DENIED.**

**SIGNED** this 27th day of July, 2015.

  
ROBERT W. SCHROEDER III  
UNITED STATES DISTRICT JUDGE